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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RICHARD M. NIXON, President of the United States, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

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Motion for Leave to File Brief *Amicus Curiae*

The attorneys for Richard M. Nixon having refused consent to the filing of this brief by the American Civil Liberties Union,* this Motion is filed pursuant to Rule 42.

The American Civil Liberties Union is a nationwide nonpartisan organization of more than 250,000 members devoted solely to the preservation of the liberties safeguarded by the Bill of Rights. For more than fifty years the ACLU has participated in hundreds of cases in this Court to advance individual liberties and to assure that governmental power is limited as required by the Constitution.

The case at bar involves profound issues concerning the power of the President to resist the processes of law. It is no exaggeration to state that this case presents the ques-

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* The letter of consent from the Special Prosecutor has been filed with the Clerk of the Court.

tion whether the United States is a government of laws in which all citizens, including the President, are subject to the judicial process or whether the President can himself define the reach of the judicial and constitutional rules to which he is subject.

We believe that our brief, which examines the historical and judicial precedents concerning executive privilege, will be of substantial assistance to the court in the resolution of the issues in this case.

NORMAN DORSEN
Attorney for Movant

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

Interest of *Amicus*

The interest of *Amicus* is set out in the preceding Motion for Leave to File.

Questions Presented

1. Whether the President, when he has assumed sole personal and physical control over evidence demonstrably material to the trial of charges of obstruction of justice in a federal court, is subject to a judicial order directing compliance with a subpoena *duces tecum* issued on the application of the Special Prosecutor in the name of the United States.

2. Whether a federal court is bound by the assertion by the President of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of obstruction of justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

3. Whether a claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high government officials who participated in those deliberations, particularly where there is a *prima facie* showing that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.

Summary of Argument

I

The President, like other citizens, is not above the law. It is the duty of the courts to determine what the law is and the obligation of every citizen to obey it. The Constitution contains no express privilege or immunity which places the President beyond the reach of compulsory judicial process, nor can one be inferred from the doctrine of separation of powers. For more than a century and a half the courts have reviewed the actions of all three branches of government, including actions by Presidents beyond their statutory or constitutional authority. Indeed, the tradition of holding the Executive accountable for his acts extends deep into our constitutional history, the English Crown having long been held to be subject to the process of the courts.

II

Since the acts of the President are subject to constitutional limitation and judicial review, the President has no authority solely in his discretion to withhold material evidence from a judicial proceeding, particularly a criminal trial. This Court and others have on several occasions reviewed claims of executive privilege to withhold information "in the public interest", while no court has ever recognized an absolute privilege of the kind advanced by the President in this case. Nor does the historical record, despite its ambiguities, support the President's position. Finally, the separation of powers is based not on isolation but on interaction of the three branches of government, each being subject to the checks and balances of the other two.

III

Whatever privilege concerning advisory communications may attach to the office of the presidency, it does not shield the occupant of that office from producing documentary material when there is substantial evidence that it relates to a crime. The unofficial acts of a President, such as conducting a political campaign or otherwise acting outside the scope of his official duties, certainly are not shielded from the scrutiny of a criminal proceeding. This Court has twice held in recent years that an explicit constitutional privilege protecting the speech or debate of Members of Congress may not be used to block criminal investigations, and it must now reject an assertion of presidential privilege with no similar constitutional basis but having the same result. Finally, the public has a right, derived in part from the First Amendment, to obtain evidence relating to pos-

sible crimes committed by high elected officials, whom this Court has held necessarily enjoy fewer privileges than ordinary citizens in a representative democracy.

ARGUMENT

Introduction

There have been few comparable occurrences when this Court has been called upon to reaffirm a bedrock constitutional principle on which our society rests. The closest case is *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579 (1952), where a President beset by heavy responsibility and an ongoing war, sought in manifest good faith to assure needed supplies of steel in order to protect American lives and property and to advance American foreign policy objectives. In a decision that has grown in stature and impact with the years, the Court rejected proffered theories of Executive "inherent power" and reasserted the Rule of Law as it applied to the President even in time of national emergency. See also *United States* v. *United States District Court*, 407 U.S. 297 (1972).

The case at bar presents comparable questions concerning the supremacy of law, although in a different legal and political context. As in the *Youngstown* case, there is no need to consider, much less impugn, the good faith of the President in order to insist with the utmost gravity that attempts to elevate the office of the President above the law as defined by this Court must be decisively rejected. The issue does not depend upon one's view of the current controversy embroiling the nation. It turns on the absolute necessity to preserve the constitutional balance. As Mr. Justice Jackson, concurring in *Youngstown*, observed:

"With all its defects, delays and inconveniences, men have discovered no techniques for long preserving free government except that the Executive be under the law and that the law be made by parliamentary deliberation." 343 U.S. at 655.

I.

The President is not above the law: he is subject to judicial process.

The fundamental issue raised in this case is whether the President, acting in his sole discretion, can disregard an obligation imposed on all other citizens to produce evidence demonstrably material to the trial of criminal charges of obstruction of justice in a federal court. Although the Constitution protects citizens from certain lines of inquiry and methods of gathering evidence in a criminal proceeding, the President does not invoke these protections; rather, he asserts an absolute immunity from any form of legal process.

There is no proposition more dangerous to the health of a constitutional democracy than the notion that an elected head of state is above the law and beyond the reach of judicial review. This proposition, currently advanced by the President, is a frontal attack on the elementary principle set forth by Chief Justice Marshall in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province and duty of the judicial department to say what the law is."

It is a basic premise of our constitutional government that the judiciary is to determine what the law is and that every citizen is subject to the law. It is inconceivable that

a sweeping presidential immunity should arise merely out of implications drawn from custom, untried in the courts; in fact, no such custom exists. Equally basic to the Constitution is the idea that the Executive Branch must be subject to continuing scrutiny, lest, being the most powerful and vigorous, it encroach on the other branches. James Wilson expressed this sentiment to the Pennsylvania Ratification Convention:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character. 2 Elliot 480 (emphasis supplied).

Had the Framers intended to deviate from these principles of constitutional government, or had they wanted to grant novel immunities and privileges, they would have done so plainly and clearly. But nowhere in the Constitution of the United States is the President granted immunity from legal process.

There is ample precedent that the President must submit to compulsory process of the courts. In *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807), Chief Justice Marshall ruled that a subpoena may be directed to the President. "That the President . . . might be subpoenaed and called upon to produce any paper which is in his possession, is not controverted, indeed that has once been decided." T. Carpenter, The Trial of Colonel

Aaron Burr 37 (1807), cited in Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1117 (1974). Even counsel for President Jefferson in the *Burr* case admitted, "We do not think that the President is above legal process . . . . and if the president possesses information of any nature which might tend to serve the cause of Aaron Burr, a subpoena should be issued to him, notwithstanding his elevated position." *Id.* at 75. George Hay, the United States Attorney in the *Burr* case, said:

> I never had the idea of clothing the President . . . . with these attributes of divinity . . . . That high officer is but a man; he is but a citizen; and, if he knows anything in any case civil or criminal, which might affect the life, liberty, or property of his fellow citizens . . . . it is his duty to . . . . go before a Court, and declare what he knows. *Id.* at 90-91.

Nor does the tripartite separation of powers imply presidential immunity from judicial process. As Mr. Justice Brandeis observed, dissenting in *Myers* v. *United States*, 272 U.S. 52, 293 (1926):

> The Doctrine of Separation of Powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The Constitution provides that: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time

to time ordain and establish." U.S. CONST. art. III, §1. To hold that the President is immune from judicial scrutiny would deny this express delegation of the judicial power to the courts; to base such a holding on the doctrine of separation of powers would defeat the purpose for which the doctrine was designed.[1]

Furthermore, if the notion of Presidential immunity is to be gleaned from the separation of powers, there are no grounds for distinguishing presidential claims of immunity from the claims of any other officer in the Executive or Legislative Branch. If immunity from judicial process is a necessary element of the doctrine of separation of powers, then a judicial order directed to a lesser executive officer or to an officer of the Congress would prove no less an interference. Yet, for the past century and a half, in the exercise of their duty "to say what the law is," courts have reviewed the actions of all three branches of government. In a variety of notable cases, courts have invalidated the actions of Presidents (or Cabinet officers acting under presidential orders) as beyond their statutory or constitutional authority, e.g., *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *United States District Court,* 407 U.S. 297 (1972), and have compelled presidents to perform the ministerial obligations of their office, *Marbury* v. *Madison, supra,* as well as their duties as citizens, *United States* v. *Burr, supra.*

[1] As Madison observed: "It may always be expected that the judicial branch . . . will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution, as well as in questions . . . concerning the boundaries between the several departments of the Government as in those between the Union and its members." 4 LETTERS AND WRITINGS OF JAMES MADISON 340-50 (1867).

Just as no grant of Presidential immunity can be inferred from the separation of powers, no other provision of the Constitution extends immunity from judicial process. While Senators and Representatives enjoy a limited immunity from inquiry concerning "Speech and Debate" on the floors of Congress, U.S. Const., art. I, §6, ¶1, the Constitution is silent as to any such privilege for the President. As Solicitor General Robert H. Bork recently stated: "Since the Framers knew how to, and did, spell out immunity, the natural inference is that no immunity exists where none is mentioned." Memorandum for the United States at 10, *Application of Spiro T. Agnew,* Civil No. 73-965 (D. Md.) cited in Berger, *The President, Congress, and the Courts,* 83 YALE L.J. 1111, 1125 (1974).

The long tradition of holding the President accountable for his acts is not limited to American constitutional history. Lord Coke in 1688 expressed the view, which was to dominate English political thought in the seventeenth century, that the King himself was "under . . . the laws." *Prohibitions del Roy,* 17 Eng. Rep. 1342 (1608). Nearly two centuries later this principle was being applied by the English courts to require the production of Crown documents relevant to civil as well as criminal litigation. For example, in an admiralty case involving a ship seized by British authorities in 1789, the shipowner was permitted to employ judicial process to obtain a secret order of the Privy Council relating to the Crown's seizure policy. In ordering production, the Court pointed out:

> In any cause where the Crown is a party, it is to be observed, that the Crown can no more withhold evidence of documents in its possession than a private person. If the court thinks proper to order the production of the documents, that order must be obeyed.

The Ship Columbus, 1 Collectanae Juridica 88, 92 (1789), cited in Berger, ***Executive Privilege v. Congressional Inquiry*** (Part II), 12 U.C.L.A. L. REV. 1287, 1294 (1965).

Summing up the constitutional history establishing judicial review of executive action, the Supreme Court in *United States* v. *Lee,* 106 U.S. 196, 220 (1882), rejected an argument similar to the President's claim in this case:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are the creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The Court should apply these settled principles to the case at bar.

II.

The doctrine of executive privilege does not give the President unreviewable discretion to withhold evidence in this or any other case.

The precise issue presented by the President's assertion of executive privilege is whether the President has implied authority to withhold evidence from the Special Prosecutor *solely in his discretion,* or whether his decision to do so is subject to constitutional limitation and judicial review.

A. *Judicial Precedents Do Not Support the President's Claim of Privilege.*

At the beginning, Chief Justice Marshall stated that, "[b]y the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 135, 165 (1803). The Chief Justice nevertheless recognized the authority of the judiciary to review all acts not explicitly committed by the Constitution to executive discretion and to determine for itself which issues are precluded from judicial review. Such a determination is "peculiarly irksome, as well as delicate," but the task is mandated by the Constitution. 5 U.S. at 168-170.

Most invocations of executive privilege have involved presidential refusal to supply information to Congress. But the issue raised in this case by the President's refusal to submit to the process of the courts with respect to the tapes sought by the Special Prosecutor should be treated in the same way as would a presidential refusal to supply such material to Congress. In both cases the central question is whether the President has an unreviewable power to withhold from another branch of government any information he deems privileged.

There is no need for the Court to address the broad question of whether or not the privilege which the President claims has some basis in law.[2] Rather, "the issue is whether

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[2] Professor Raoul Berger maintains that "executive privilege . . . is a myth . . . , a product of the nineteenth century, fashioned by a succession of presidents who created 'precedents' to suit the occasion." R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 (1974). Berger searches the Constitution, history and laws and finds no such justification for executive privilege.

the President has the implied authority under the Constitution to withhold data from Congress [and the courts] *solely in his discretion*, or whether his decision to do so is subject to constitutional limitation and judicial review." Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 11 (1974) (emphasis in original).[3]

The Supreme Court has not yet spoken squarely on the issue. But lower court rulings and statements by this Court reinforce the conclusion that the President cannot be the final arbiter of the so-called "executive privilege."

In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971), the Court of Appeals considered and rejected a claim of absolute privilege: "Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." Following that decision, the Court of Appeals in *Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973), stated:

[3] President Nixon, while a Member of Congress, made the following point:

> I am now going to address myself to an issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.
>
> I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive Order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.
>
> Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits. Cong. Rec. 4783 (April 22, 1948).

> [C]ounsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.

Judicial authority to compel evidence from the President is grounded in its power to issue mandatory orders to officers of the Executive Branch. Issuance of such orders has, on occasion, required a determination of the limits of the President's authority under the Constitution. Mr. Justice Frankfurter, concurring in *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. at 596, pointed to the necessity of such a determination: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action."

While the President himself is a party to this action, in *Youngstown* the Secretary of Commerce was the named defendant. This is obviously but a formal distinction. The decision in *Youngstown* effectively restrained the President; it affirmed a District Court order enjoining an action ordered by President Truman claimed to be authorized by the Constitution. As the Court of Appeals noted in *Nixon* v. *Sirica*, 487 F.2d at 709: "[T]he practice of judicial review would be rendered capricious and very likely impotent—if jurisdiction vanished whenever the President personally denoted an executive action or omission as his own."

The extent to which the *Burr* case recognizes a right of "executive privilege" is currently being debated. There is no doubt, however, that the decision rejects the claim of discretionary presidential power of the kind advanced here. In his opinion Chief Justice Marshall stated:

> Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after these subpoenas have issued, not in any circumstance which is to precede their being issued. *United States* v. *Burr,* 25 Fed Cas at 34.

Thus, while the President should be protected from harassment, his protection emanates from the courts: the office of the Presidency—although the highest and most powerful in the land—is not itself a shield from judicial process, nor should it be in any government of laws.

In *United States* v. *Reynolds,* 345 U.S. 1 (1953), where there was a conceded need to protect the Executive from potentially damaging effects flowing from the possible discovery of military secrets, the Court held, "the [trial] court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ," 345 U.S. at 8, because "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Even a compelling claim involving secret weapons, therefore, cannot provide immunity from the judicial process where the Constitution is silent.

While a claim of absolute Presidential immunity from judicial process has not been previously raised before this Court, there is a substantial body of law holding that the courts will require the production of departmental records and papers under appropriate circumstances, including copies of documents prepared for the President. One such case is *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 93 (1973), in which the Court stated that, pursuant to the Freedom of Information Act, the District Court "may order" an *in camera* inspection of unclassified documents to determine whether and to what extent they are subject to the requirements of the Act. Although the Court in *Mink* recognized, as it did in *Reynolds, supra,* that the national interest in safeguarding military secrets may bar certain documents and materials from discovery, whatever privilege exists results from the application of rules that are judicially or legislatively determined. There is, in short, no judicial support for the breathtaking claims of the President in this case.

B. *The Historical Record Does Not Support the President's Position.*

While the historical record is at times ambiguous, and therefore open to varying interpretations, compare *Nixon* v. *Sirica,* 487 F.2d 700 (majority opinion), with 487 F.2d at 731-37 (MacKinnon, J., dissenting), it emphatically does not sustain an unreviewable presidential power to withhold information from Congress or the courts.

One of the dissenting opinions in *Nixon* v. *Sirica,* 487 F.2d at 778, correctly points out that "[t]hroughout this nation's 184-year Constitutional history, Congress and the Executive have succeeded in avoiding any near-fatal con-

frontation over attempts by Congress to procure documents in the Executive's possession." The absence of such a clash indicates that presidents have refrained from asserting the extraordinary power that is claimed here. The pattern was set by President Washington, who at least once questioned the authority of Congress to demand documents, but eventually complied with congressional requests and never directly confronted Congress with a discretionary refusal to disclose. The one denial by Washington of a request for information—a demand by the House of Representatives for all papers relating to the negotiation of the Jay Treaty —was based on the President's correct conclusion that the House lacked power under the Constitution to demand information relating to the making of treaties. Washington conceded, however, that the Senate could receive the documents.[4]

It is true that during the early presidencies a congressional practice developed of extending to the President an implied "privilege" to withhold certain investigative reports and state secrets from public disclosure. Where the offer extended by Congress was accepted by the President and documents were withheld, however, the arrangement was generally recognized as an accommodation rather than the exercise of an unreviewable presidential power.[5] When Jefferson declined, for example, to produce certain information on the Burr conspiracy in 1807, he was acting upon a House request that expressly excepted "such [information] as he may deem the public welfare to require not to be disclosed."[6] This congressional accommodation, of course, did not exempt Jefferson from compulsory judicial process. See *United States* v. *Burr, supra.*

[4] See Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1079-80, 1089-93 (1965).

[5] When this "accommodation" broke down, as it did on one occasion during the presidency of Andrew Jackson in 1835, Congress found it appropriate to apply sanctions against the Executive, by, for example, refusing to confirm a presidential nominee. *Id.* at 1095.

The historical record, therefore, is at best ambiguous and of no help in supporting the President's claims in this case. As one recent commentator has observed, the post-1787 precedents "bear all of the earmarks of their essential character as political compromises, and thus yield no unitary conception of the Constitutional basis of a privilege."[7]

C. *The Privilege Does Not Inhere in the Doctrine of the Separation of Powers.*

In the absence of historical or judicial support for the President's claim of unreviewable power to withhold information from the Congress and the courts, we turn again to the President's argument that such a privilege is necessary to protect the power of the Executive and is therefore required by the doctrine of separation of powers.

Proponents of the President's interpretation of the doctrine of separation of powers argue that if the judicial branch can "coerce" the Chief Executive into surrendering documents and records, "then the Chief Executive is no longer 'master in his own house.'" *Nixon* v. *Sirica*, 487 F.2d at 769 (Wilkey, J., dissenting). This argument is defective on several grounds.

[6] Quoted in Mem. of Atty. Gen. William Rogers, submitted to Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate, 85th Cong., 2nd Sess. (1958), reprinted in 44 A.B.A.J. 941, 944 (1958).

[7] Frohnmayer, "An Essay on Executive Privilege" (ABA Samuel Pool Weaver Constitutional Law Prize Essay for 1974) reprinted in Cong. Rec. 56603 (April 30, 1974) (daily ed.).

First, it is equally true that if the Special Prosecutor cannot obtain evidence necessary and material to a criminal proceeding because the President asserts an unreviewable executive privilege, the judicial branch is not master in *its* house.

There is a broader perspective on the separation of powers issue. As Hamilton stated, each branch must be given "the necessary constitutional means and personal motives to resist encroachments of the others." Federalist No. 51 at 337. These means and motives preserve a dynamic balance between the three departments. Congress has the power to make appropriations, to vest jurisdiction in the courts and to determine the procedures by which they operate, and to impose legal duties on the Executive. The President has the power to veto congressional action and the power to appoint the officers of the judicial branch. The courts play their constitutional role by checking unconstitutional action on the part of any branch. Thus, *no* branch is entirely "master in its own house." Each branch is subject to checks and balances from the others, and the separation of powers depends on interaction, not isolation. See *Myers* v. *United States,* 272 U.S. at 293 (Brandeis, J., dissenting).

Furthermore, separation of powers was often seen by the Framers as a safeguard against encroachment by the *Executive.* Charles Pinckney, commenting on the express congressional privilege from arrest, said:

> . . . They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should be exercised here . . . . Let us inquire why the Constitution should have been so attentive to each

> branch of Congress . . . and have shown so little to the President . . . In this respect no privilege of this kind was intended for our Executive, nor any except that which I have mentioned for your Legislature. 3 Farrand 385.

Having no foundation in law or history, and not being a necessary and explicit element of the doctrine of separation of powers, the President's claim to an unreviewable executive privilege to withhold data from Congress and the courts must be rejected as a dangerous fiction and inconsistent with the rule of law.

III.

Executive privilege cannot be invoked to defeat a subpoena for documentary material when there is substantial evidence that it relates to a crime.

If the President is subject to judicial process and "the court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ," *United States* v. *Reynolds,* 345 U.S. at 8, the only remaining question is whether any such claim can withstand judicial scrutiny where the material sought is essential to a criminal prosecution. The only claim of privilege that has any arguable relevance to the subject of this case involves the President's asserted power to withhold materials relating to internal advice within the Executive Branch.[8] We urge that whatever privilege may attach to the office of the Presidency, it does not shield the occupant of that office from

[8] See Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts,* 35 Ohio St. L.J. 1, 29-33 (1974).

producing documentary evidence essential to a criminal trial.[9]

The principle that every citizen has the duty to give evidence is fundamental in Anglo-American law. Mr. Justice White recently asserted ". . . the longstanding principle that the public . . . has a right to every man's evidence except for those persons protected by a constitutional, common law, or statutory privilege . . . ." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).[10] The President is not protected in this case by any such "constitutional" privilege. There is undoubtedly a principle to be served in protecting the internal decisionmaking process of each branch of government. The justification for this principle is that the development of public policy may be inhibited if individuals in government cannot rely on the confidentiality of their communicated opinions. See, e.g., *Soucie* v. *David*, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971).

The proper scope of an "advice privilege" which may be asserted by the President, subject to judicial review, is as follows:

1. The privilege may be claimed (only by the President personally) with respect to recommendations, advice and

[9] The Court in this case need not decide what the constitutional privilege should be if (a) the President were subpoenaed personally, or (b) the evidence sought were not material to a fair trial.

[10] A footnote in Mr. Justice White's majority opinion in *Branzburg*, quoting from Jeremy Bentham, vividly illustrates why (408 U.S. at 688):

> . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly not. 4 THE WORKS OF JEREMY BENTHAM 320-21 (1843).

suggestions passed on by members of the Executive Branch acting under lawful authority for consideration in formulation of policy. See *Environmental Protection Agency* v. *Mink*, 410 U.S. at 85-89; *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F.2d 47, 51-52 (4th Cir. 1973).

2. The privilege may not be asserted with respect to what has been *done*, as distinct from what has been advised. The President is accountable for his actions and for decisions that he has made leading to action by others. See, e.g., *Grumman Aircraft Engineering Corporation* v. *Renegotiation Board*, 482 F.2d 710, 718-19 (D.C. Cir. 1973).[11]

Whatever the effect of an "advice privilege" in other circumstances, there is no justification for confidentiality when there is substantial evidence that the communications at issue themselves may relate to a crime, such as obstruction of justice. "There is obviously an overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by the veil of an advice privilege." Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 32 (1974).

This Court has recently underscored its impatience with claims of *explicit constitutional privilege*, based on the separation of powers, when that privilege is used to block investigations concerning "possible third party crimes."

[11] To the extent there is a privilege protecting certain aspects of the Presidency from public view, " . . . it should extend at most to official acts, not to unofficial acts of a candidate campaigning with the aid of a Reelection Committee that, according to testimony, sought to corrupt the election." R. Berger, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 261 (1974).

In *Gravel* v. *United States,* 408 U.S. 606 (1972), the Court held that Senator Gravel's assistant could be compelled to testify about the publication of the Pentagon papers, which Gravel himself had read on the Senate floor. Mr. Justice White, writing for the majority, stated that even the Senator could be interrogated by a grand jury if his sources of information related to crime, since the Constitution "provides no protection for criminal conduct threatening the security of the person or property of others . . . " 408 U.S. at 622.

A similar result was reached in *United States* v. *Brewster,* 408 U.S. 501 (1972), a case involving a claim of immunity by former Senator Daniel Brewster of Maryland, who was prosecuted for having received a bribe to influence his action on postal legislation. The Court of Appeals had held that the indictment was invalid because it put into question a Senator's constitutionally protected motives for legislative action, but the Supreme Court reversed on the ground that "[t]aking a bribe is, obviously, no part of the legislative process or function." 408 U.S. at 526.

Gravel and *Brewster* appear to foreclose any claim by the President that his taped conversations concerning alleged criminal activities in the White House are covered by a privilege for "advisory communications," because in those cases the Court was dealing with the *explicit* constitutional immunity granted by Article I, Section 6. But there is no such specific immunity based on executive privilege. It is, therefore, all the more plain that the privilege, whatever its reach, does not permit the President to withhold information concerning criminal conduct.

Similarly, it is plain that a common law privilege may be outweighed by the exigencies of a criminal prosecution. In *United States* v. *Clark,* 289 U.S. 1, 16 (1933), the Court held that upon showing of a prima facie case that a jury was tainted, the interest in confidential jury proceedings was outweighed by "the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." The privilege fell and "the debates and ballots in the jury room" became admissible in evidence. 289 U.S. at 14. The indictment in the instant case of several parties to alleged conversations recorded on the tapes subpoenaed by the Special Prosecutor easily meets the *Clark* standard of a "prima facie showing."

On May 22, 1973, before the existence of the White House tapes became known, the President issued a statement which accurately and succinctly summarized the law: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters under investigation." [12] This Court should hold the President to his earlier correct position.

Apart from the President's duty, in common with all citizens, to give evidence in a criminal proceeding, the public has a right to obtain the evidence, particularly when it relates to possible crimes committed by high elected officials. This right derives in part from the First Amendment, the primary purpose of which is to insure that citizens are informed about the activities of their government.

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[12] New York Times, May 23, 1973.

It is axiomatic that a free flow of information is essential to democratic self-government.[13]

A corollary of this axiom is the duty of high elected officials, and the President in particular, to account fully to the electorate for their actions. As Mr. Justice Black emphasized, concurring in *New York Times Company* v. *Sullivan*, 376 U.S. 254, 257 (1964), "a representative democracy ceases to exist the minute that the public functionaries are by any means absolved from their responsibility to their constituents" (quoting Blackstone). Indeed, *Sullivan* affirmed the principle that elected officials enjoy fewer privileges than ordinary citizens. It is for this reason that the Court has pointed out that the First Amendment is rooted in the struggle "to establish and preserve the right of the English people to full information in respect to the doings and misdoings of their government." *Grosjean* v. *American Press Company*, 233 U.S. 245, 247 (1936).

While we realize that a criminal proceeding is not primarily a vehicle for informing the public, when the President withholds evidence needed for the prosecution, he frustrates the principle that when criminal charges are made, "society's interest is best served by a thorough and extensive investigation . . . " *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). As the Court of Appeals for the District of Columbia has stated, if an unqualified executive power to withhold information is sustained by the judicial branch, "the head of an executive department would have the power on his own say so to cover up all evidence of fraud and

[13] Among the many recognitions of this principle throughout our history is the statement by Patrick Henry that, "the liberties of the people never were . . . secure when the transactions of their rulers may be concealed from them." 3 Elliot 170.

corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra*, at 794. See also *Nixon* v. *Sirica*, 487 F.2d at 714.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,

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